

*United States Court of Appeals
for the Second Circuit*



**PETITIONER'S
BRIEF**

NO. 76-4083

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

W. J. USERY, JR., SECRETARY OF LABOR,

Petitioner,

v.

MARQUETTE CEMENT MANUFACTURING CO.

and

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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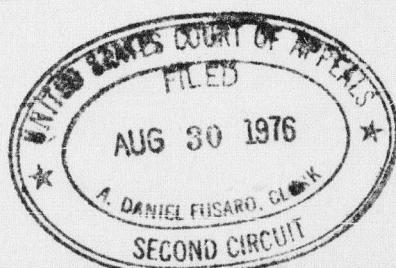
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ON PETITION TO REVIEW AN ORDER OF THE
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BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF ISSUES PRESENTED

1. Whether the Commission erred in reversing a ruling by its administrative law judge granting the Secretary's motion to amend his citation to allege a violation of 29 U.S.C. 654(a)(1), the Act's general duty clause.
2. Whether the Commission erred as a matter of law in failing to find that Marquette violated 29 U.S.C. 654(a)(1), the Act's general duty clause.

STATEMENT OF THE CASE

1. Nature of the case

This case is before the Court pursuant to section 11(a) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 *et seq.*) on the Secretary of Labor's petition to review an order of the Review Commission issued against him on January 27, 1976. (A. 67).^{1/} This Court has jurisdiction under 29 U.S.C. 660(b), the cited violation having occurred in Catskill, New York.

2. Pertinent Evidence

The facts are undisputed. Marquette Cement Manufacturing Co. (Marquette) operates a cement manufacturing plant in Catskill, New York where it employs approximately 150 workers (A. 16-21). On August 29, 1973, Marquette employees were engaged in the demolition and reconstruction of a brick kiln in the Kiln Building at this plant. The kiln is an essential part of the cement manufacturing process and is used by Marquette to dry raw materials and to form the compounds which are the elements of cement. Raw material is carried into the kiln by a conveyor system; the kiln rotates and the raw materials are transferred through by gravity. As the material is dumped through the kiln the brick lining is worn away; when it is worn to less than one-half its original width, those bricks which are worn must be removed and that portion of the kiln relined with new bricks. Relining of the

^{1/} "A" references are to the joint appendix filed with petitioner's brief; "Leg. Hist." references are to Committee Print, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92 Cong. 1st Sess. (June 1971).

kiln, at least partially, is necessary a minimum of four times annually and requires an average of 5 days to complete. During this relining process, it is Marquette's standard work practice to dispose of the partially worn out bricks and attendant debris by placing them in an unguarded chute in the Kiln Building. The unprotected chute leads to a large hole in the exterior wall of the building from which the bricks fall naturally 26 feet to the alleyway between the Kiln building and the nearby Crane Storage Building (A. 16-17) (~~Appendix A~~).

It is undisputed that both the Crane Storage Building and the Kiln Building are located on the cement plant grounds (A. 17). It is equally undisputed that Marquette employees are assigned to work "near the alleyway", that Marquette was fully aware of the existence and condition of both the unguarded chute and wall opening in the building, and that despite these factors, Marquette did not "provide any protection to [employees] from hazards created by falling bricks," and specifically took no measures such as providing "danger signs, barricades or an enclosed chute...as a means of preventing employee exposure to falling bricks" (A. 17-18).

At approximately 8:45 p.m. on August 29, 1973, during the course of a normal work shift, a Marquette employee, Frank Rysavy, was in this alleyway when he was struck by a large quantity of debris dumped out of the chute from the interior of

the Kiln Building. Rysavy died immediately as a result of a crushed skull. (A. 18).

3. Administrative Proceedings.

In response to this fatality report ^{2/} an OSHA compliance officer inspected Marquette's cement plant in Catskill on September 5, 1973. On September 14, 1973, the Secretary cited Marquette for a serious violation of the Act's general duty clause, section 5(a)(1) ^{3/}, for failure to furnish employment

^{2/} Such inspections are virtually mandatory where as here a fatality report has been received. See FIELD OPERATIONS COMPLIANCE MANUAL N-1 through 2 (July 1974); 29 CFR 1904.8 (1974).

^{3/} Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1), provides that every employer affecting commerce "shall furnish to each of his employees employment...free from recognized hazards that are causing or are likely to cause them death or serious harm." Section 17(k), 29 U.S.C. 666(j), provides that a serious violation exists where "there is a substantial probability that death or serious physical harm could result...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Because of the close parallel between the language of sections 5(a)(1) and 17(k), supra, the Secretary has declared as a matter of official policy that only serious general-duty violations will be cited under that clause. U.S. Dept. of Labor, Occupational Safety and Health Administration, FIELD OPERATIONS MANUAL VIII - 4 (July 1974).

free from recognized hazards likely to cause death or serious physical harm. The citation described the alleged hazard at length and proposed numerous forms of abatement as follows:

The employer failed to furnish to each of his employees working near the passageway between the Kiln Building and the Crane Storage Building a place of employment which is free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that the employer did not provide suitable means to protect employees from the hazards created by falling bricks, such as: providing danger signs to alert employees that an immediate hazard exists from falling bricks; providing barricades to deter and prevent employees from entering the brick dumping area; providing an enclosed chute for the dumping of bricks from a 26 foot level; providing other suitable means of preventing employee exposure to falling bricks (A. 2).

A \$600 penalty was proposed for this alleged violation and abatement ordered by October 8, 1973. Marquette timely contested this citation on September 20, 1973. The Secretary then filed his formal complaint with the Commission on October 17, 1973 in which he amended the citation to charge a violation of section 5(a)(2) of the Act (29 U.S.C. 654(a)(2)) for failure to comply with 29 CFR 1926.852(a) solely on the ground that Marquette was engaged in the demolition and reconstruction of its brick kiln, since the factual basis for the violation remained identical. ^{4/}

^{4/} Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), provides that each employer engaged in interstate commerce "shall comply with occupational safety and health standards promulgated under this Act."

(continued)

Thus, the complaint pertinently described the violative condition:

On August 29, 1973, respondent violated section 5(a)(2) of the Act and the Occupational Safety and Health Standard found at 29 CFR 1926.852(a) promulgated pursuant to section 6 of the Act at its workplace located at Route 9W, Catskill, New York in that respondent failed to insure that no material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected. While respondent was engaged in the demolition and reconstruction of a brick kiln in the kiln building it subjected its employees working near the passageway between the kiln building and the crane storage building to the hazards created by falling bricks. On August 29, 1973, employee Frank F. Rysavy was fatally injured by debris, including brick removed from the kiln, dumped out of an unprotected chute from the interior of the building.

In accordance with section 9(a) of the Act the citation provided that the above violation was to be abated by October 8, 1973. Such period was a reasonable period for the abatement of this violation (A. 7).

(4/ continued)

29 CFR 1926.852(a) which is part of subpart T covering "Demolition" provides:

Chutes

(a) No material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected.

The Secretary's complaint specifically stated that:

Item I of the citation has been amended by paragraph V of this complaint to allege a serious violation of 29 CFR 1926.852(a) in place of the serious violation of section 5(a)(1) of the Act. The reason for the amendment is that investigation has disclosed that respondent was engaged in the demolition and reconstruction of a brick kiln and therefore the safety and health regulations for construction found at 29 CFR Part 1926 properly apply to this alleged violation (A. 7-8). (emphasis added)

Marquette thereafter filed an answer admitting jurisdiction but denying both the substantive allegations of the alleged violation and the applicability of the cited standard (A. 12-14). The case was submitted to an administrative law judge on a stipulation of facts and accompanying briefs. In its April 3, 1974, brief, Marquette principally contended that 1926.852(a) was inapplicable because relining the kiln did not constitute demolition work but repair and maintenance of manufacturing equipment; that the Secretary should not be permitted to amend "after the evidence has been presented" (A. 23); and apparently anticipating that a 5(a)(1) amendment would be both requested and allowed, that the Secretary had not carried his burden of proof with respect to a 5(a)(1) violation because there was no evidence that Marquette "knew or should have known that the manner in which the removed brick was discarded constituted a hazard to its employees" (A. 23-24). In his brief of April 8, 1974, the Secretary did move to amend the complaint pursuant to rule 15(b) of the Federal Rules of Civil Procedure ^{5/} to allege a 5(a)(1) violation, should the judge determine that Marquette was not engaged in the construction business and therefore not covered by the specific standard cited. The Secretary noted that the factual bases and appropriate abatement measures for both charges were identical. On September 24, 1974 the judge issued a decision

^{5/} The Federal Rules of Civil Procedure are made applicable to OSHA administrative proceedings by 29 U.S.C. 661(f), Section 12(g). 29 CFR 2200.2(b) states that "in the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure."

allowing the amendment to the complaint alleging a 5(a)(1) violation in the alternative, but vacating the 5(a)(1) citation. The Secretary thereafter timely petitioned the Commission to direct review pursuant to 29 U.S.C. 661(i), asserting that a "recognized hazard" was established by objective determinations and common sense; that the potential for serious physical injury was demonstrated by the death of an employee; and that Marquette, while fully aware of the hazardous condition and potential employee exposure, had taken no measures to protect its employees, in derogation of its statutory duties. On January 27, 1976, the Commission held that the administrative law judge erred in permitting the Secretary's amendment to again allege a 5(a)(1) violation. It concluded, however, that this error was not prejudicial since the record did not establish a 5(a)(1) violation for the reasons given by the judge.

4. Decisions below

The administrative law judge found that Marquette was not in violation of 29 CFR 1926.852(a) on the grounds that the demolition and reconstruction of the cement kiln constituted "repair of manufacturing equipment" and not "construction work", the only type of employment conditions covered by 29 CFR 1926 (A. 38-39), and that in any event, demolition constituted the "razing or tearing down of structures", but not their repair (A. 39).

The judge did, however, permit the Secretary's motion to amend to a 5(a)(1) violation in light of Rule 15, Federal Rules of Civil Procedure, because "the legal issue, on this record, has been expressly tried...the factual or evidentiary basis for a Section 5(a)(1) charge has not been changed, i.e., the Stipulation of Facts," and "[r]espondent is [not] prejudiced thereby" (A. 41). Turning to the merits, the judge vacated the 5(a)(1) allegation on the grounds that

[t]here is no evidence in this record that Respondent's method of discarding the used brick taken from the Kiln under repair, was causing or was likely to cause death or serious physical harm to any employee engaged in employment activity,

since the employee killed "was an employee of 27 years experience" and was, on the date of his death, August 29, 1973, "assigned to perform maintenance work inside the Kiln Building " (A. 42-43).

On review, two Commission members held that the administrative law judge had erred in permitting the Secretary to amend the complaint at such a "late stage of this proceeding" to allege a 5(a)(1) violation. In so holding, they determined that there was no express consent to the amendment under 15(b) because Marquette expressly objected in its briefs to the amendment. They further held there was no implied consent. In support of this conclusion, the Commission noted that although introduction of evidence relevant to an amended charge indicates consent to try the issue,

"it must appear that the parties understand that such evidence went to the amended charge, and was not introduced solely because it was relevant to another legal issue being tried" (A. 70). Here, because the stipulation of fact identified the issue to be decided by the Commission as the alleged noncompliance with 1926.852(a), and because of its view that such an amendment "could prejudice" Marquette "by not allowing it an opportunity to introduce rebuttal evidence on elements of a 654(a)(1) violation which are not part of a 654(a)(2) charge, such as whether the alleged violative condition constituted a recognized hazard" (A. 70-71), the Commission found no implied consent. The majority then determined, however, that the error was not prejudicial because they agreed with the administrative law judge's disposition on the merits of the 5(a)(1) charge "for the reasons given by him" (A. 71).

Commissioner Cleary dissented on both issues. In the first place, he would have found that the Secretary had carried his burden of proof with respect to showing (1) that the employer failed to render its workplace "free" of a hazard, (2) that the hazard was "recognized" and (3) that "it was causing or likely to cause death or serious physical harm" and that accordingly the stipulated facts established a violation of 5(a)(1). Reviewing the stipulated facts, paragraphs 6-9, he pointed out that Marquette admitted disposing of bricks and debris by dropping them

from an exterior opening in the wall of the plant 26 feet above the ground--an action constituting "a patent hazard to anyone below"; that Marquette admitted that it assigned employees to work near the alleyway and took no precautions whatever to afford them protection from falling bricks, even though "employees had access to the alleyway, and their presence there was foreseeable." Finally, he noted that there could be "no doubt regarding the seriousness of potential injuries...[T]his is regrettably demonstrated by the death of an employee on August 29, 1973 " (A. 74).

Commissioner Cleary also would have affirmed the judge's determination to permit amendment to allege a 5(a)(1) violation. In the first place, applicable administrative law principles simply require that the parties be put on notice of the issues in controversy, since "[t]he key to pleading in the administrative process is nothing more than the opportunity to prepare" (A. 74). ^{5a/} Moreover, if no prejudice ensues to the adverse party, the shifting of legal theories is permissible. Here there can be no question of notice to Marquette since "[t]he history of this case from the outset may be described as an effort by the parties to determine whether the general duty clause or the standard at 29 CFR 1926.852(a) is applicable" (A. 74). And contrary to the apparent view of the majority, the parties' stipulation that the issue before the judge was the applicability of 852(a) did not put an end to this problem, but "simply reflects [it]". In

5a/ By its own terms, 29 CFR 2200.2(b) does not apply the FRCP to the form of OSHA pleadings, since a specific provision, 10(c), makes applicable section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. Section 551 et seq., regarding the form of OSHA pleadings.

this respect, "[t]he stipulated facts regarding the hazard and accident are unrelated to the characterization of respondent's activities as construction or manufacturing." In these circumstances, the majority's apparent determination to decide the amendment issue on the formal wording of the stipulation "is contrary to the purpose of notice pleading" (A. 75). Commissioner Cleary would therefore have permitted the amendment ^{6/} absent a showing of prejudice by the respondent.

The Secretary's petition to this Court to review the Commission's order followed.

ARGUMENT

I. THE COMMISSION ERRED IN REVERSING THE JUDGE'S DETERMINATION THAT AMENDMENT TO A 5(a)(1) CHARGE WAS PROPER

1. As detailed supra, Marquette Cement's Catskill plant was inspected on September 5, 1973 in response to an employee ^{7/} fatality report. The ensuing inspection revealed that standard operating procedure at this plant consisted of removing the brick lining of the cement kiln four times a year for five day periods and disposing of the worn bricks and attendant debris by tossing them through a wall opening 26 feet above ground level into the alley below. Despite the fact the alley was clearly accessible to

^{6/} Commissioner Cleary noted that Marquette's "mere allegation" of prejudice was insufficient to warrant reversal of the judge, but it would be appropriate to remand the case to permit introduction of evidence in support of the allegation (A. 75).

^{7/} This Court has frequently examined the Act's remedial purposes, broad scope, and operation in enforcement contexts, which (continued)

Marquette employees, the undisputed facts show that Marquette took no precautions at all to either warn employees when bricks were to be thrown into the alley or to erect an enclosed chute to contain the cascading bricks and debris. It is further clear that on the evening of August 29, 1975, Frank Rysavy, a Marquette employee, walked into the unprotected alley; that while he was there a large quantity of bricks and debris were thrown out of the Kiln building into the alley; and that these bricks fell on Rysavy who was killed instantaneously as a result of a crushed skull. On the basis of these undisputed, indeed stipulated, facts the Secretary issued a citation alleging that Marquette had violated section 5(a)(1) of the Act for its failure to provide employees with a workplace free from recognized hazards causing or likely to cause serious physical injury or death. The citation described that failure in great detail as consisting of Marquette's brick-disposal work practice and detailed numerous simple but expedient means of abatement, including erection of a danger sign at the mouth of the alleyway and the erection of an enclosed chute to contain the material as it fell to the ground. Thereafter, in his complaint, the Secretary amended the citation to allege a violation

(7/ continued)

need not be reiterated here. E.g., Brennan v. OSHRC and Underhill Const'n. Corp., 513 F.2d 1032 (C.A. 2, 1975); REA Express v. Brennan and O'HRC, 495 F.2d 822 (C.A. 2, 1974); Brennan v. OSHRC and John J. Gordon Co., 492 F.2d 1027 (C.A. 2, 1974). See generally National Realty and Const'n. Co. v. OSHRC and Secretary, 489 F.2d 1257 (C.A.D.C., 1973); Brennan v. Butler Lime and Cement Co. and OSHRC, 520 F.2d 1011 (C.A. 7, 1975).

of section 5(a)(2) of the Act solely because Marquette's activity of relining the kiln constituted demolition and reconstruction and was therefore covered by a specific construction standard, 29 CFR 1926.852(a). Thus, the gravamen of a violation under that provision is identical to that of the general duty violation previously alleged since it states that "no material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected." Subsequently, in his brief to the administrative law judge, the Secretary requested the judge to consider the merits of a 5(a)(1) violation on the instant facts should the judge reject the 5(a)(2) charge on the threshold determination that Marquette was not engaged in construction activities and therefore not covered by the specific standard. In support of his motion to amend the Secretary noted that the substantive factual bases of the alleged violations were identical, as were possible means of abatement. Moreover, in its brief to the judge Marquette fully anticipated the secretary's action since it addressed the merits of both the 5(a)(1) and 5(a)(2) violation-finding on the stipulated record. ^{8/} Thereafter, the judge permitted amendment

8/ See Certified List filed pursuant to Federal Rule of Appellate Procedure 17.

to 5(a)(1) 9/ but the Commission did not, and the Commission also found no 5(a)(1) violation shown. As we show below, the Commission doubly erred in not permitting amendment and in failing to find a violation by Marquette of the general duty clause.

2. Rule 15(b) of the Federal Rules of Civil Procedure is expressly made applicable to Commission proceedings by section 12(g), 29 U.S.C. 661(f) and provides that:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.
Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence (emphases added).

9/ Thus, as the judge noted:

The Respondent in its brief, addresses the question of whether the proofs establish a violation of Section 5(a)(1) of the Act...the legal issue, on this record has been expressly tried. Further, the factual or evidentiary basis for a Section 5 (a)(1) charge, has not changed, i.e., the Stipulation of Facts. Therefore, my understanding of Commission precedent, judicial precedent, and Rule 15 of the Federal Rules of Civil Procedure, leads me to conclude that the Complainant's Motion should be granted, as I am unable to conclude on this record that the Respondent is prejudiced thereby (A. 41).

The obvious purpose of this provision is to avoid the hardships produced by technical common law pleading and enable courts to reach a decision on the merits whenever possible. Thus, as the Supreme Court stated in U.S. v. Houghan, 364 U.S. 310, 317 (1960): "The purpose of Rule 15(b) is to facilitate proper decisions on the merits and to avoid pleading as a game of skill where one misstep by counsel is decisive to the outcome." These goals have received express approval under OSHA, for as the D.C. Circuit has noted, "[S]o long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though formal pleadings did not squarely raise the issue" because "[e]nforcement of the Act would be crippled if the Secretary were inflexibly held to a narrow construction of citations [and complaints]."

National Realty and Const'n. Co. Inc. v. OSHRC and Secretary of Labor, 489 F.2d 1257, 1264 (1973).

That these principles plainly require the Commission to permit the Secretary to amend his complaint clearly follows from the fact that application of rule 15(b) does not even depend on whether the Secretary has requested a formal amendment. As the text of the Rule indicates, tribunals are independently under a duty to consider whatever issues are raised by the evidence, and formal amendment is necessary only where there has been an objection to the evidence introduced at trial. Thus, the Tenth Circuit among many others has noted:

Under Rule 15(b) ... a liberal provision is made for amendments to conform the pleadings to the evidence and in such cases it is the duty of the court to consider issues raised by evidence received without objection even though no formal application is made to amend.

Underwriters Salvage Co. v. Davis & Shaw Furniture Co., 198 F.2d 450, 453 (C.A. 10, 1952) (emphasis added). ^{10/} And this Court has similarly held that:

The language of...[15(b)] is mandatory, not merely permissive. The rule...provides for free or delayed amendment but states that 'failure so to amend does not affect the result of the trial of these issues'. Indeed, formal amendment is needed only when evidence is objected to at the trial as not within the scope of the pleadings. Securities and Exchange Commission v. Rapp, 304 F.2d 786, 790 (C.A. 2, 1962) (emphasis added).

Hester v. New Amsterdam Cas. Co., 287 F. Supp. 957, 971-972 (D.S. Car., 1968), aff'd in part, 412 F.2d 505 (C.A. 4, 1969) (emphasis added). Cf. Nat'l. Realty and Const'n. Co., supra, 489 F.2d at 1264 and nn. 29-30, noting with approval that administrative pleadings are "very easily amended" and "experience shows that unimportance of pleadings [in the administrative process] is a virtue."

^{10/} Accord: O'Brien v. Moriarty, 489 F.2d 941, 943 (C.A. 1, 1974); Bradford Audio Corp. v. Pious, 392 F.2d 67, 73-74 (C.A. 2, 1968); Niedland v. U.S., 338 F.2d 254, 258 (C.A. 3, 1964); Bettes v. Stonewall Ins. Co., 480 F.2d 92, 94 (C.A. 5, 1973); Swift and Co. v. U.S., 393 F.2d 247, 252 (C.A. 7, 1968); Hopkins v. Metcalf, 435 F.2d 123, 124-125 (C.A. 10, 1970). Cf. Frankel v. Kurtz, 239 F. Supp. 713, 717 (D.S. Car. 1965).

3. Accordingly where the stipulated facts plainly support a violation under an alternative statutory section, whose applicability Marquette was specifically apprised of, the only relevant issue is whether amendment will prejudice the merits of the opposing party's case, for

[t]he test of [trial by] consent should be whether the defendant would be prejudiced by the implied amendment, i.e., whether he could offer any additional evidence if the case were to be tried on a different theory.

Monod v. Futura, Inc., 415 F.2d 1170, 1174 (C.A. 10, 1969). 11/

This question must be answered in the negative since in the first place Marquette was afforded fair notice of the charge against it, given adequate opportunity to defend against 12/ that charge and actively did so. The condition alleged to be violative of the Act, both in the citation alleging a 5(a)(1) violation and in the complaint alleging a 5(a)(2) violation, was identically described as the brick-disposal work practice. Appropriate means of abatement were identical under both sections of the Act cited,

11/ Accord: U.S. v. 47 Bottles, 320 F.2d 564, 573 (C.A. 3, 1963); Hester v. New Amsterdam Gas. Co., supra, 287 F. Supp. at 971-972; Wallin v. Fuller, 476 F.2d 1204, 1210 (C.A. 5, 1973); Howey v. U.S., 481 F.2d 1187, 1190 (C.A. 9, 1973); Strauss v. Douglas Aircraft Co., 404 F.2d 1152, 1155 (C.A. 2, 1968). Cf., Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 330-331 (1971), reh. den. 401 U.S. 1015 (15(a); same prejudice test).

12/ The merits of the 5(a)(1) violation are fully discussed infra at 23-35.

and were specifically enumerated as including danger signs, barricades and an enclosed chute. Moreover, Marquette was on notice as early as the issuance of the complaint that the sole reason the Secretary had amended from the 5(a)(1) violation to the 5(a)(2) was that he believed Marquette was engaged in demolition covered by the construction standard 1926.852(a). That standard of course requires exactly the same type of protection against falling debris for workers engaged in construction activity as would the general duty clause for those not covered by a specific standard. ^{14/} Finally, because of the obvious identity of the 5(a)(1) and 5(a)(2) violation here, Marquette itself anticipated in its brief that the Secretary would probably move to amend back to the 5(a)(1) violation in the alternative. As the judge noted, even before the Secretary moved to amend, Marquette fully

14/ Safety standards promulgated pursuant to section 6(b) of the Act afford presumptively superior notice and for this reason must be cited and applied in preference to the general duty clause wherever possible. National Realty and Construction Co. v. OSHRC and Secretary, 489 F.2d 1257 (C.A.D.C., 1973); American Smelting and Refining Co. v. Brennan, 501 F.2d 504 (C.A. 8, 1974); Brisk Waterproofing Co., OSHRC Docket No. 1046, 1973-74 CCH OSHD para. 16,345; Sun Shipbuilding and Drydock Co., OSHRC No. 161, 1973-4 CCH OSHD para. 16,725. Accordingly, as in the instant case, amendment from 5(a)(1) to 5(a)(2) does not necessarily represent a change in the theory of the case.

addressed both the prospective amendment and the substance of a 5(a)(1) violation. supra, p. 7, 9. Marquette's anticipation and defense of the 5(a)(1) charge itself demonstrates the error inherent in the Commission's holding that the amendment came too late in the proceeding, since Marquette was plainly on notice and made a defense. Under such circumstances, amendment is never too late since the plain wording of Rule 15(b) permits amendment to conform to the evidence at any time even after judgment and at the appellate level.

Cornell v. Chase Bank, 142 F.2d 157 (C.A. 2, 1943). Purofled Down Products Co. v. Travelers Fire Inc., Co. 278 F.2d 439 (C.A. 2, 1960) ("such amendment . . . may be made upon the motion of any party at any time, even after judgment."). ^{15/} Accordingly on this record the judge's determination to permit the amendment on the grounds that Marquette had sufficient

^{15/} Such factors fully dispose of the Commission's heavy reliance on the fact that the parties stipulation stated the question was "Was Respondent properly cited for a serious violation of 29 CFR 1926.852(a)?" Such reliance is misplaced not only because it is plainly equivalent to a determination that 15(b) amendment is proper only if there is express consent, but also because it plainly overlooks the facts that "[t]he history of this case from the outset may be described as an effort by the parties to determine whether the general duty clause or the standard...is applicable [and] [t]he stipulated issue on the applicability of the cited standard simply reflects this problem." (A. 75).

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notice and opportunity to defend is not only correct but
required and the Commission plainly erred in reversing him. 16/

4. No different result respecting whether Marquette could be prejudiced is required by its allegation below that it would be prejudiced by the amendment because it would have presented more evidence if it had known of the 5(a)(1) charge in advance. Marquette made no attempt to show what that evidence would consist of, and such a failure has regularly been construed as an indication that the party has suffered no prejudice. NLRB v. Greater N.Y. Broadcasting Co., 147 F.2d 337, 339 (C.A. 2, 1945), cert. denied 325 U.S. 860 (1945); NLRB v. Yale Towne Mfg. Co., 114 F.2d 376, 379 (C.A. 2, 1940). 17/

16/ See NLRB v. Pecheur Lozenge Co., 201 F.2d 393, 402 (C.A. 2, 1973) cert. denied 347 U.S. 953 (1954); NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333, 350 (1938) (amendment back to a charge previously made and abandoned specifically upheld); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (C.A. 9, 1972) (amendment from section 2 of Sherman Act to section 7 of Clayton Act); American Newspaper publishers Association v. NLRB, 193 F.2d 782 (C.A. 7, 1951) affirmed 345 U.S. 100; L.G. Balfour Co. v. FTC, 442 F.2d 1, 17 (C.A. 7, 1971); Armand Co. v. FTC, 84 F.2d 973, 974 (C.A. 2, 1936). We particularly note that this and other courts have stated that appellate courts should, absent a clear abuse of discretion, defer to the decision of the trial judge as to whether the parties have consented to try an unpleaded issue since trial judges are closer to the initial litigation and have a better opportunity to understand the intentions of the parties. Reserve Mining Co. v. EPA, 514 F.2d 492, 535 (C.A. 8, 1975); Strauss v. Douglas Aircraft, 404 F.2d 1152, 1155 (C.A. 2, 1968).

17/ Accord: Key Pharmaceuticals, Inc. v. Lowey, 54 F.R.D. 447 (D.C.N.Y., 1972); Nagoya Associates v. Esquire, Inc., 191 F. Supp. 379 (D.C.N.Y., 1961). Indeed the plain language of 15(b) places an affirmative duty on the objecting party to carry the burden of proof on this issue. Fed. R. Civ. P. 15(b); Iodice v. Calabrese, 345 F. Supp. 248, S.D.N.Y. 1972, aff'd in part, rev'd on other grounds, 512 F.2d 383 (C.A. 2, 1975); Public Administrators of N.Y. County v. Curtiss Wright Corp. 224 F. Supp. 236 (D.C.N.Y., 1963). That burden is very difficult to meet. And even if the objecting party establishes prejudice, if that prejudice can be cured by a continuance or remand for a limited purpose, that is the course mandated by 15(b), not dismissal of the case, the Commission's course here. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. at 330-331; Rodale Press, Inc. v. FTC, 407 F.2d 1252, 1256-7 (C.A.D.C., 1968).

Yet the Commission accepted this bare allegation as sufficient to establish prejudice, stating that Marquette "could [be] prejudiced" by the lack of an "opportunity to introduce rebuttal evidence on elements of a 5(a)(1) violation which are not part of a 654(a)(2) charge, such as whether the alleged violative condition constituted a recognized hazard" (A. 71). To suggest that Marquette might bring forth evidence showing that the practice of dropping bricks from an opening 26 feet in the air should not be construed as a recognized hazard because the cement manufacturers don't know that falling brick presents a serious threat to anyone passing below is absurd, see discussion infra at 23-29 .

II. THE COMMISSION ERRED IN NOT FINDING THAT
MARQUETTE'S CONDUCT VIOLATED SECTION 5(a)(1) OF THE ACT

Section 5(a)(1) requires each employer to

furnish to each of his employees employment
and a place of employment which are free from
recognized hazards that are causing or are
likely to cause [them] death or serious physical
harm...

Under this general duty clause the Secretary must prove "(1)
that the employer failed to render its workplace 'free' of a
hazard which was (2) 'recognized' and (3) causing or likely to
cause death or serious physical harm." National Realty and
Const'n. Co., supra, 489 F.2d at 1265. A condition is a
recognized hazard either where it is generally known to be
hazardous in the employer's industry or where the employer has actual
knowledge of its dangerous potential. National Realty, supra,
489 F.2d at n. 32; Brennan v. OSHRC and Vy Lactos Laboratories,
494 F.2d 463-464. Moreover, the courts have stated, with words
a fortiori applicable here, that even when hazardous conduct is
caused by employee negligence, that conduct

may be a "recognized hazard" [which is
feasibly reducible or preventable] even if
the defendant employer is ignorant of the
activity's existence or potential for harm.

* * *

Hazardous conduct is not preventable [only]
if it is so idiosyncratic and implausible in
motive or means that conscientious experts,

familiar with the industry, would not take it into account in prescribing a safety program ... [or] its elimination would require methods of...training, monitoring, or sanctioning workers which are either so untested or expensive that safety experts would substantially concur in thinking the methods infeasible. All preventable forms and instances of hazardous conduct must, however, be entirely excluded from the workplace. To establish a violation of the general duty clause, hazardous conduct need not actually have occurred, for...feasibly curable inadequacies may...be demonstrated before employees have acted dangerously... [But] The record must...indicate that demonstrably feasible measures would have materially reduced the likelihood [of such actions]...

National Realty, supra, 489 F.2d at 1265-67 nn. 32, 37. Accord: Getty Oil Co. v. OSHRC and Secretary, 530 F.2d 1143, 1145 (C.A. 5, 1976) Brennan v. Butler Lime and Cement Co. 520 F.2d 1011, 1017 (C.A. 7, 1975).

It is also quite obvious, as both common sense and the unfortunate death here demonstrate, that the potential for injury from a large quantity of bricks falling 26 feet is great, that is, that the hazard is, at the least, likely to cause death or serious physical harm. See, National Realty, supra, 487 F.2d at n. 33; Cf. Shaw Construction, Inc., v. OSHRC and Usery, ---F.2d--- (No. 75-3495, C.A. 5, July 12, 1976) (Addendum B, n. 4); California Stevedore and Ballast Co. v. OSHRC, 517 F.2d 986, 988 (C.A. 9, 1975).

These principles bring into focus the very narrow issue involved in the instant case, for there really is no dispute either that respondent was aware of its own practice of dumping bricks from 26 foot high levels or that there was no

protection from the potential harm caused by the bricks to anyone passing under the unguarded opening. Marquette not only regularly engaged in this dumping process four times a year for five day periods but stipulated that it did not "provide any protection to [employees] from hazards created by falling bricks," and specifically took no measures such as providing "danger signs, barricades or enclosed chute...as a means of preventing employee exposure to falling bricks." Nor is there any dispute that there was a variety of simple inexpensive "demonstrably feasible" precautions which Marquette could have taken to either eliminate the hazard entirely or to prevent employee access to the hazard. Such factors---Marquette's actual knowledge of the brick-disposal conditions, the fact of employee access to the hazard, its obvious potential to maim or kill anyone passing by, and the ease with which the hazard could be contained---would seem to make the 5(a)(1) violation here apparent. Marquette argued however, and both the judge and the Commission agreed, that it was not sufficient for a prima facie showing of violation of 5(a)(1) to show employee access to the area of these blatantly hazardous conditions

but that the Secretary must show that the area is ordinarily
used as a passageway or that employees are assigned to work there. ^{18/}

^{18/} That this was the issue on 5(a)(1) is made clear from viewing excerpts of Marquette's brief, and the judge's decision.

The Secretary of Labor offered no evidence whatsoever that the Respondent knew or should have known that the manner in which the removed brick was discarded constituted a hazard to its employees. To the contrary, the evidence reveals that there is no explainable reason for the presence of Mr. Rysavy in the area in question. Similarly, the record is devoid of any evidence whatsoever that any employee has cause to be in the area. In short, there is no evidence whatsoever that the Respondent should have recognized the activity in question as hazardous (emphasis supplied) (A.24).

The judge adopted this rationale, noting that

"...there is no evidence to support a conclusion that this area was used by Respondent's employees as a passageway, nor as an area within which any work was to be performed....The record is similarly devoid of any evidence to establish any reason for any employee to be in this area " (emphasis supplied) (A.42).

The judge noted moreover that the killed employee had 27 years experience at Marquette, and that at the time of the accident he was scheduled to be working inside the Kiln Building. On review to the Commission, Marquette made the same arguments it made to the judge. Thus Marquette stated in its brief to the Commission "...merely because the disposal of bricks into working areas of a construction site without the use of chutes, etc., might constitute a 'recognized hazard', it does not necessarily follow that Respondent's manner of brick disposal constituted a recognized hazard" (A. 55). The Commission thereafter expressly adopted the judge's decision on the merits (A. 71).

We note first that the evidence is undisputed that these bricks were being dumped into an unguarded alleyway, that the alleyway was on Marquette's property, that Marquette itself was causing the hazardous condition, and that employees plainly had access to the alley, which by definition is "a narrow street or walk," since they worked both in the adjoining buildings and "near the alley." In these circumstances, Marquette cannot deny responsibility for hazards it creates in the alley, for, as this Court made clear in Brennan v. OSHRC and Underhill Construction, 513 F.2d 1032, 1038-1039 (C.A. 2, 1975),

in a situation where, as here, an employer is in control of an area, and responsible for its maintenance, we hold that to prove a violation of OSHA the Secretary of Labor need only show that the area of the hazard was accessible to the employees of the cited employer.

And rejecting an employer's argument that its employees were not exposed to falling hazards created by noncompliance with the Secretary's guardrail standards because none were observed in imminent danger of falling off, the Court stated:

...It is hazards toward which the Act was directed...the legislative history is supportive of the proposition that actual observed danger is unnecessary....the key-stone of the Act is preventability...

In this regard it is not insignificant that it was Dic-Underhill that created the hazards and maintained the area in which they were located....It had control over the areas in which the hazards were located and the duty to maintain those areas.

...[w]hat we have said carries with it the arguments of Dic-Underhill...made in respect to the three perimeter guardrails of 29 CFR 1926.500(d)(1), that as to the first only the field engineers who were "checking targets" (and had to lean out over the edge of the building to do so) and no other employees were seen; that as to the second only one man (though a Dic-Underhill employee) 15 feet away from the edge and not in danger of falling was observed; and as to the third, the two men using the ceiling sanding machine were 10 feet from the edge and hence not exposed. One takes it that Dic-Underhill would have us hold that for a citation properly to issue, an employee of the particular employer creating the perimeter hazard must be seen by an inspector teetering on the edge of the floor 150 feet or so up from the ground. No such interpretation is consistent with, let alone called for by the Act (emphasis supplied).

The established fact of employee access to the hazard requires the same employer foreseeability-responsibility result here. Indeed, such a result is the only one consistent with Congress' intent that the general duty clause expand employers' common law obligation to avoid unreasonable risks to employees ^{19/}

19/ The conference reports of both the Senate and the House state that:

Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The Committee believes that employers are equally bound by this general and common
(continued)

by requiring them to "take more than merely reasonable precautions for the safety of employees [because of their]... great control...over the conduct and working conditions of employees. National Realty supra, n. 34. Accordingly, a 5(a) 20/ (1) violation was not only reasonable but required on this record. —

(19/ continued)

duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a)(1) merely restates that each employer shall furnish this degree of care. There is long-established statutory precedent in both Federal and state law to require employers to provide a safe and healthful place of employment. H.R. Rep. No. 91-1291, Leg. Hist. 851; S. Rep. No. 91-1282, Leg. Hist. 149.

20/ Since access was all that was required, it is irrelevant that, as the judge pointed out, the employee killed had 27 years experience, at the time he was killed he was assigned to perform maintenance work inside the Kiln Building, and there were no witnesses to explain his presence outside the building. In addition, it was obviously error to focus on the particular employee killed (A.71,42-43), for, as the Eighth Circuit stated in rejecting a similar argument that a general duty citation was improper because three employee deaths occurred as the result of an unforeseeable chemical reaction:

The basic weakness of the...rationale is that it addresses itself to the foreseeability of the incident as it actually occurred rather than the foreseeability of the general hazard of hydrogen sulfide accumulations. Neither the general duty clause nor section 17(k) requires any actual death or physical injury for a violation to occur. A violation occurs whenever an employer fails to take reasonable precautionary steps to protect his employees from reasonably foreseeable "recognized hazards" that are causing or are likely to cause death or serious physical injury. Thus, even if

(continued)

2. That employee access is sufficient is to trigger the general duty violation is further made clear since Marquette's conduct establishes a classic prima facie case of negligence which at common law would have been sufficient to place the question of ^{21/} Marquette's liability before a jury. Thus, even at common law,

(20/continued)

the three deaths and two serious injuries involved here were actually the result of an unforeseeable chemical reaction, Vy Lactos may still have been in violation of the general duty clause because of its self-admitted failure to take any precautionary steps whatsoever to protect its employees from the hazard of hydrogen sulfide accumulations that is now apparent (emphasis added).

Brennan v. Vy Lactos Laboratories, Inc., 494 F.2d 460, 463 (C.A. 8, 1974). As discussed supra at 3, 20-23, Marquette has admitted its failure to take any precautionary safety measures whatsoever despite the fact that it has also admitted that employees are assigned to work near the alleyway and are exposed to the hazard of falling bricks.

The judge's determination that the Secretary had not proved a serious violation because he had not demonstrated that the employer knew or with the exercise of reasonable diligence could have known of the violation is also incorrect. Even assuming this was the Secretary's burden, the fact that the employer created and controlled the hazard and that employees obviously had access to it plainly demonstrates any knowledge necessary for a serious violation.

21/ The doctrine of res ipsa loquitur --"the facts speak for themselves" --is, as a matter of hornbook law, commonly applied to give rise to the inference that the person in control of the injury-causing instrumentality must have been negligent in the case of objects such as bricks falling from a defendant's premise. Prosser, Law of Torts, 4th Ed. at §39, pp. 214-215 citing Kearney v. London, B. & S.C.R. Co., L.T. 5Q.B. 411 (1870); Lipsitz v. Schecter, 377 Mich. 685, 142 N.W. 2d 1 (1966); Both v. Harband, 164 Cal. App. 2d 140 (1958); Kelly v. Laclede Real Estate & Inv. Co., 348 Mo. 407, 155 S.W. 90 (1941); Levit's Jewelers, Inc. v. Friedman, Tex. Civ. App., 410 S.W. 2d 947 (1967).

employers had a well-established duty to warn employees of hazardous conditions of which the employee might reasonably be expected to remain in ignorance. Bassett v. New York, 235 F.2d 900, 901 (C.A. 3, 1956); Brennan v. Gordon, 118 N.Y. 489, 23 N.E. 810 (1890); Moore v. Morse and Malloy Shoe Co., 89 N.H. 332, 197 A. 707 (1938); Engelking v. City of Spokane 59 Wash. 446, 110 P.2d 25 (1910); Baumgartner v. Pennsylvania R. Co., 292 P.2d 106, 140 A. 622 (1928); Prosser, Law of Torts, 4th Ed. §80, pp. 526. Similarly, irrespective of any special common law duty running from employer to employee, even owners and occupiers of land were held to have an affirmative obligation to at least warn discovered trespassers, licensees and invitees of actively dangerous ^{22/} artificial conditions existing upon their land. Furthermore, this Court has held that once such questions are placed before a jury, the test for negligence liability to be applied is whether the burden of taking adequate precautions to prevent the unreasonable risk is less than the probability of harm resulting

22/ Duty to discovered trespassers:

Omaha & R.V.R. Co. v. Cook, 42 Neb. 477, 60 N.W. 899 (1894); Baltimore & O.R. Co. v. State to Use of Welch, 114 Md. 536, 80 A. 170 (1911); Gulf & S.I.R. Co. v. Williamson, 162 Miss. 726, 139 So. 601 (1932).

Duty to licensees:

Second Restatement of Torts §341. Kaslo v. Hahn, 36 Wis. 2d 87, 153 N.W. 2d 33 (1967).

Duty to invitees:

Second Restatement of Torts §332; F.W. Woolworth Co. v. Williams, 59 U.S. App. D.C. 147, 41 F.2d 920 (1930); Greeley v. Miller's 111 Conn. 584, 150 A. 500 (1930).

multiplied by the seriousness of the injury which will occur. . .

As Learned Hand stated in United States v. Carroll Towing Co.,

159 F.2d 169, (C.A. 2, 1947):

"[T]he. . . duty . . . to provide against resulting injuries is a function of three variables: (1) the probability . . . that she [the barge] will break away; (2) the gravity of the resulting injury, if she does, (3) the burden of adequate precautions....if the probability be called P , the injury, L ; and the burden B ; liability depends upon whether B is less than L multiplied by P ; i.e., whether B [is less than] PL .

Respecting the instant case, it is not disputed that a few simple precautions by Marquette -- indeed even one so simple as the proper placement of a large danger sign, or the provision of an enclosed chute from the building to the ground -- would have totally obviated the hazard; that these numerous feasible measures were both inexpensive and easy to take; and that as a result of Marquette's failure to take even these simple precautions, Frank Rysavy was "inadvertently" killed on August 29, 1973. Obviously, the burden of taking adequate precautions --e.g., the minimal cost of a sign or enclosed chute -- is exponentially less than the probability ^{23/} of harm multiplied by the seriousness of injury resulting, Rysavy's death.

23/ Even at common law, the question was not one of "mathematical probability alone." For example, "the odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railroad track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train. Gallagher v. Montpelier & Wells River R. Co., 100 Vt. 299, 137 A. 207 (1927); Prosser, supra at §31, pp. 147.

Accord: Pease v. Sinclair Refining Co., 104 F.2d 183 (C.A. 2, 1939); Tullgren v. Amoskeag Mfg. Co., 82 N.H. 268, 133 A. 4 (1926); Gulf Refining Co. v. Williams, 183 Miss. 723, 185 So. 234.

It accordingly follows that since Marquette's conduct would have constituted simple common-law negligence, it constitutes a violation of the far higher duty imposed by the Act to search out and defuse even passive unsafe workplace conditions. National Realty and Construction Co. v. Brennan and OSHRC, *supra*; American Smelting and Refining v. OSHRC and Secretary, *supra*, 501, F.2d 511, Brennan v. Vy Lactos Laboratories, Inc., *supra*, 494 F.2d at 463 (a general duty violation may occur even if industry as a whole does not recognize a condition as hazardous if the employer has actual knowledge of the conditions comprising the hazard-e.g., production of a dangerous chemical as a result of inadequate ventilation); REA Express, Inc. v. Brennan, *supra*, 495 F.2d at 826, (a general duty violation may occur even when a high voltage circuit room is open only to a few of an employer's employees and is usually kept locked and unavailable); Getty Oil Company v. OSHRC and Secretary, --- F.2d --- (C.A. 5, No. 75-1828, April 23, 1976) 3 CCH ESHG ¶ 20,649 (a general duty violation may occur even where an employer has given an employee numerous prior warnings of a required safety practice if he has an opportunity to inquire whether the employee has followed that safety practice and fails to do so).

3. We finally note that reversal of the Commission's decision is required since the Act is remedial social legislation passed in order to afford "so far as possible every working man and woman in the nation safe and healthful working conditions" both the general duty clause and specific safety standards should be liberally interpreted to achieve this intent, Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340, 1343 (C.A. 2, 1974); REA Express v. Brennan and OSHRC, 495 F.2d 822 (C.A. 2, 1974); and the Commission is the agency Congress entrusted to effectuate the goal of the statute by implementing "an effective enforcement program." 29 U.S.C. 551(10). For these reasons, in addition to its general obligation as an administrative agency to reach decisions on the merits irrespective of the technicalities of

procedural pleadings e.g., Nat'l. Realty, supra, 489 F.2d at 1264, the Commission is specifically obligated to treat the proven violations here, since its dismissal of this citation vitiates any mandate that Marquette Cement had to correct admitted hazards, and thus permits continued employee exposure to a practice of dropping bricks from a height of twenty-six feet onto a passageway accessible to employees. This result neither assures safe working conditions "so far as possible" nor "preserves our human resources". Supra. Rather, it undermines effective enforcement and the Act's legitimacy by permitting employers to evade statutory safety responsibilities and the Commission to act "as an umpire blandly calling balls and strikes" rather than as a body charged with "active and affirmative protection" of the public interest. Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608, 620 (C.A. 2, 1965), cert. den. 384 U.S. 941, quoted in Brennan v. John J. Gordon, 24/ supra, 492 F.2d at 1032. These results were clearly not what Senator Javits had in mind when he stated in support of his successful floor amendment creating the Commission that it would protect employees from proven hazards with "certainty and celerity", charter a quasi-judicial body which would engender "greater confidence" in all the Act's constituents, and permit fair results on "the weight of the evidence." Leg. Hist. 463, 466.

24/ Accord: Michigan Consolidated Gas Co. v. F.P.C., 283 F.2d 204, 224 (C.A.D.C., 1960), cert. den. 364 U.S. 913; N.L.R.B. v. Dennison Mfg. Co., 419 F.2d 1080, 1083 (C.A. 1, 1969),

CONCLUSION

For the above reasons the Commission's order should be set aside and an order entered holding Marquette in serious violation of the general duty clause.

Respectfully submitted,

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A D D E N D U M B

Addendum B

SHAW CONST., INC. v. OCCUPATIONAL S. & H. REVIEW COM'N 4443

SHAW CONSTRUCTION,
INC., Petitioner.

v.

OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION
and W. J. Usery, Jr., Secretary of La-
bor, Respondents.

No. 75-3495

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

July 12, 1976.

Underground utilities construction company petitioned for review of an order of the Occupational Safety and Health Review Commission which held that it had committed two serious violations of regulations defining safety standards for trenching operations. The Court of Appeals, Ainsworth, Circuit Judge, held that there was substantial evidence to support the Commission's determination that the company had committed a serious violation of a trenching operation regulation by having three-foot-high soil banks and large asphalt chunks within two feet of its trench where vibrations caused by nearby traffic and equipment in the trench might cause debris to fall into trench, occasioning substantial probability that someone working in trench would suffer serious injuries or death. Occupational Safety and Health Act of 1970, §§ 12(i), 17(k), 29 U.S.C.A. §§ 661(i), 666(j).

Affirmed in part, reversed in part, and remanded.

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

1. Labor Relations \Leftrightarrow 7

Violation of Occupational Safety and Health Act regulation may be deemed "serious" where, although accident itself is merely possible, there is substantial probability of serious injury if it does occur. Occupational Safety and Health Act of 1970, § 17(k), 29 U.S.C.A. § 666(j).

See publication Words and Phrases for other judicial constructions and definitions.

2. Labor Relations \Leftrightarrow 27

Substantial evidence supported Occupational Safety and Health Review Commission's determination that underground utilities construction company committed "serious" violation of trenching operation regulation by having three-foot-high soil banks and large asphalt chunks within two feet of its trench where vibrations caused by nearby traffic and equipment in trench might cause debris to fall into trench, occasioning substantial probability that someone working in trench would suffer serious injuries or death. Occupational Safety and Health Act of 1970, §§ 12(i), 17(k), 29 U.S.C.A. §§ 661(i), 666(j).

3. Labor Relations \Leftrightarrow 27

Occupational Safety and Health Review Commission could not affirm administrative law judge's determination by one-to-one vote. Occupational Safety and Health Act of 1970, § 12(e, i), 29 U.S.C.A. § 661(e, i).

Petition for Review of an Order of Occupational Safety and Health Review Commission (Texas Case).

4444 SHAW CONST., INC. v. OCCUPATIONAL S. & H. REVIEW COM'N

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge:

Shaw Construction, Inc., an underground utilities construction company, petitions for review of an order of the Occupational Safety and Health Review Commission dated July 22, 1975, which held that Shaw committed two serious violations of regulations defining safety standards for trenching operations. In May of 1973, Shaw was engaged in lowering a telephone conduit which entailed, among other things, the construction of a trench nine feet deep, five feet wide, and twenty feet long.

The Secretary of Labor cited Shaw for a number of alleged violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., in connection with this trench. The citations were contested, and the Commission administrative law judge who heard the

1. 29 C.F.R. § 1926.651(i)(1) (1975) provides:

In excavations which employees may be required to enter, excavated or other material shall be effectively stored and retained at least 2 feet or more from the edge of the excavation.

2. 29 C.F.R. § 1926.652(c) (1975) provides:

Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each 1/2-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion.

3. 29 U.S.C. § 661(i) provides:

A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such hearing

case determined that two serious violations had occurred. The first involved Shaw's failure to store excavated materials more than two feet from the edge of the trench, in violation of 29 C.F.R. § 1926.651(i)(1);¹ the second concerned improper shoring or sloping of the trench under 29 C.F.R. § 1926.652(c).² Following the issuance of the administrative law judge's decision, Shaw petitioned for discretionary review by the full Commission pursuant to 29 U.S.C. § 661(i).³ The Commission agreed to dispose of the case, but due to the fact that one of its members had resigned and had not been replaced at the time Shaw's petition was considered, only two commissioners participated in the review of the initial decision and order. Acting without a third member, the Commission affirmed the administrative law judge's determinations as to each of the violations. Both commissioners concurred in affirming the first violation; the second was af-

examiner by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

While the statute refers to the hearing officer as a "hearing examiner," the current title pursuant to a Civil Service Commission order is "administrative law judge," see K. Davis, *Administrative Law and Government* 164 (2d ed. 1975), and we follow the respondents in referring to the hearing officer in this manner. The initial decision of the administrative law judge was entered on January 17, 1974. Shaw's Petition for Discretionary Review was mailed to the Chairman of the Occupational Safety and Health Review Commission on February 6, 1974. Chairman Moran exercised his authority under section 661(i) to direct review on February 19, 1974.

firmed by a divided, one-to-one vote. A subsequent petition for rehearing after a third member had been appointed to the Commission was denied.

[1] With regard to the first violation, Shaw conceded that excavated materials were stored within two feet of the edge of its trench, and argues only that the Commission erred in holding this to be a "serious" violation. Section 17(k) of the Occupational Safety and Health Act, 29 U.S.C. § 666(j), provides:

[A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists . . . in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(Emphasis added). This provision has been construed as holding violations to be serious if they make possible an accident involving a substantial probability of death or serious physical harm. *California Stevedore and Ballast Co. v. Occupational Safety and Health Review Commission*, 9 Cir., 1975, 517 F.2d 986, 987-88.⁴

[2] The administrative law judge found that Shaw had three-foot-high soil

4. In *Accu-Nomics, Inc. v. Occupational Safety and Health Review Commission*, 5 Cir., 1975, 515 F.2d 828, 831, we indicated that "[a] violation is deemed [sic] 'serious' under the Act if there is a substantial probability of death or serious injury resulting from it." *Accu-Nomics* involved violations of trenching safety regulations which caused the accidental death of four workers. In that case, there was a substantial probability both that the accident itself would occur, and that the resulting injury would be serious if it did. We do not read the above-quoted language, however, as precluding a determination that a violation may also

banks and large asphalt chunks adjacent to its trench, and that vibrations caused by nearby traffic and equipment in the trench might cause debris to fall into the trench. If this occurred, there would be a substantial probability that someone working in the trench would suffer serious injuries or death. There was thus substantial evidence to support the Commission's 2-0 determination that a serious violation of section 1926.651(i)(1) had occurred. We find no abuse of discretion in the Commission's assessment of a \$300 penalty against Shaw for this violation. See *REA Express, Inc. v. Brennan*, 2 Cir., 1974, 495 F.2d 822, 827; *Brennan v. Occupational Safety and Health Review Commission*, 8 Cir., 1973, 487 F.2d 438, 442-43; cf. *Nadiak v. CAB*, 5 Cir., 1962, 305 F.2d 588, 593, cert. denied, 372 U.S. 913, 83 S.Ct. 729, 9 L.Ed.2d 722 (1963). We therefore affirm the Commission's order with regard to Shaw's first violation.

[3] The Commission erred, however, in disposing of the second violation with a one-to-one vote. Under the statutory provisions governing the Commission's discretionary review of determinations made by Commission administrative law judges, no official action can be taken by the Commission without the affirmative vote of at least two of its members.⁵ An

be deemed "serious" under the Act where, although the accident itself is merely possible (i.e., in statutory terms, "could result from a condition"), there is a substantial probability of serious injury if it does occur.

5. The section providing for discretionary review, 29 U.S.C. § 661(i), is quoted in note 3, *supra*. Once a Commission member directs that an administrative law judge determination be reviewed by the Commission, 29 U.S.C. § 661(e) sets the requirements for taking official action on the matter. Section 661(e) provides:

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affirmance supported by only one vote does not comply with this statutory requirement and cannot stand. We accordingly remand the case to the Commission so that it may take appropriate official action in reviewing Shaw's al-

leged sloping and shoring violation under section 1926.652(c). We intimate no view on the merits of Shaw's petition in this regard.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and

official action can be taken only on the affirmative vote of at least two members.